REASONABLE USE OF ONE'S OWN PROPERTY AS A JUSTIFICATION FOR DAMAGE TO A NEIGHBOR.*

Suppose that a landowner, by acts done on his own land, has inflicted damage on his neighbor's land, or has substantially impaired the latter's beneficial use of his land. Suppose also that the landowner, when made a defendant in a suit at law by his neighbor to recover damages, justifies on the ground that he has only been making a reasonable use of his own land. This defense involves two points: 1. That defendant has a right, within reasonable limitations, to use his own land in a manner which may inflict actual damage on his neighbor. 2. That defendant, in the case at bar, has not exceeded the limits of this right.[1]

It is common to speak of a landowner's right as "absolute". "But his right to the use of his land is not absolute. It is qualified by the right of adjacent owners to the beneficial use and enjoyment of their property." Professor Freund says: "The nature of real estate as a subject of property makes it impossible that

*"Policies seeking justification in the necessities for construction and operation of dwellings, factories, farms, and other economic improvements." 2 Wigmore, Select Cases on Torts, 294, Sub-Title II. *Ibid.* Index, p. 1044. Trespass to Realty; excused by measures "of economic improvement."

[1]Does the discussion of the right of reasonable user of land fall under "property" or "torts"?

The question is "whether a particular act * * * constitutes a violation of the obligations of vicinage". Andrews, *C. J.*, Booth *v.* Rome etc. R. R. (1893) 140 N. Y. 267, at p. 276, 35 N. E. 592.

"* * * the limitations imposed on the use of land * * * are all resolvable into the law of neighborhood." Rankine, Law of Land-Ownership in Scotland (3rd ed.) 327.

"The detailed illustration of the rule in Rylands *v.* Fletcher, as governing the mutual claims and duties of adjacent landowners, belongs to the law of property rather than to the subject of this work." Pollock, Torts (10th ed.) 509. See 1 Bohlen's Cases on Torts, Preface III.

The right of reasonable user is discussed somewhat in text-books on torts, nuisances and water rights. But it is not often given a separate place as a specific topic. In Theobald's Law of Land, published at London in 1902, it is said in the Preface: "The point of view from which the book has been written is to take a person, who is the owner of land, and to inquire what are his rights and obligations, what use can he make of his land, and how far are his rights affected by those of his neighbours." In a notice of this book in 19 Law Quarterly Review 101, the reviewer says: "Mr. Theobald has performed the uncommon feat of writing a new and useful law-book which does not fall within any recognized category."

Compare Rankine's Treatise on the Rights and Burdens Incident to the Ownership of Lands and Other Heritages in Scotland (3rd ed., Edinburgh, 1891.) See especially pp. 327, 328; and preface to 1st edition, p. v.

the ownership of it should be as absolute as that of many kinds of personal property. The enjoyment of land is in many respects dependent upon the condition of other and especially neighboring estates. The common law recognizes in consequence of this dependence certain natural rights which landowners have against each other, relating to the purity of the air, to lateral and subjacent support, and to the benefit of natural waters."[2] A landowner's "so-called absolute legal control of his own soil" is "far from being unlimited."[3] It is obvious that unless the rights of individual landowners are modified and limited they must be frequently in conflict one with another. No landowner can always do as he pleases, except by preventing other landowners from doing as they please.[4] "The rule governing the rights of adjacent landowners in the use of their property, seeks an adjustment of conflicting interests through a reconciliation by compromise, each surrendering something of his absolute freedom so that both may live."[5] "The convenience of such a rule may be indicated by calling it a rule of give and take, live and let live."[6]

The question of legal regulation of conflicting rights is not confined to rights in regard to the use of land, but extends to all cases of conflicting rights as to other matters or subjects. An able writer has said: "The due regulation and subordination of conflicting rights constitute the chief part of the science of law." And the author adds: "It is impossible to give any rule applicable to all cases which may arise except the general one that, whenever damage is caused to one man by another, the law, in deciding which shall bear the loss, is governed by principles of expediency modified by public sentiment."[7]

What use is reasonable, as between neighboring landowners in any particular case, is said to be ordinarily a question of fact; to be submitted to a jury, unless the case is so clear that only one decision can be reached by twelve honest and reasonable men.[8]

[2]Police Power, § 424.

[3]Doe, *J.*, Thompson *v.* Androscoggin R. I. Co. (1874) 54 N. H. 545, at p. 555.

[4]The above two sentences are taken from Clerk & Lindsell, Torts (6th ed.) 6-7; here substituting individual landowners for individuals in general.

[5]Andrews, *C. J.*, Booth *v.* Rome etc. R. R., 140 N. Y. at pp. 280-281.

[6]Bramwell, *B.*, Bamford *v.* Turnley (1862) 3 Best & Sm. *62, at p. *84.

[7]Addison, Torts (8th ed.) 66.

[8]*Cf.* Holmes, *J.*, Middlesex Co. *v.* McCue (1889) 149 Mass. 103, 104, 21 N. E. 230.

As to the considerations which should be weighed by the jury in passing upon the question of fact, the judge will probably give instructions in very general terms, in substance like one of the three following statements:

1. "In determining the question of reasonableness, the effect of the use upon the interests of both parties, the benefits derived from it by one, the injury caused by it to the other, and all the circumstances affecting either of them, are to be considered."[9]

2. All the circumstances must be taken into consideration, "the importance of the use to the owner as well as the extent of the damage to be inflicted upon his neighbor, and the rights of the parties are to be adjusted in a practical way, the question being whether or not the proposed use is a reasonable use under all circumstances."[10]

3. "The cause of action, if any, lies in the excess of the damage beyond what is considered reasonable, after taking into account the circumstances of time and place, and quantity of annoyance, and the relation of adjoining properties to each other."[11]

It is generally admitted that it is impossible to frame a rule so definite that its application will instantly solve all cases of conflicting rights. No rule of law can be laid down which "will furnish a standard so definite and certain that by it every state of facts will be automatically settled."[12] "The respective rights and liabilities of adjoining landowners cannot be determined in advance by a mathematical line or a general formula."[13] As was said in regard to so-called "private nuisances": "No hard and fast rule controls the subject, for a use that is reasonable under one set of facts would be unreasonable under another."[14]

[9]Carpenter, *J.*, Rindge *v.* Sargent (1886) 64 N. H. 294, at pp. 294-5, 9 Atl. 723.

[10]Williams, *J.*, Gulf etc. R. R. *v.* Oakes (1900) 94 Tex. 155, at p. 160, 58 S. W. 999. The learned judge added: "We are unable to discover that the law does, or, from the nature of the subject, can furnish a more definite rule."

[11]Sir Wm. Erle, in Appendix to Brand *v.* Hammersmith etc. Ry. (1867) L. R. 2 Q. B. *223, at p. *247.

[12]See Prof. Bohlen, 59 Univ. of Pennsylvania Law Rev. 432.

[13]Holmes, *J.*, Middlesex Co. *v.* McCue, 149 Mass. at pp. 103, 104.

[14]Vann, *J.*, McCarty *v.* Natural Carbonic Gas Co. (1907) 189 N. Y. 40 at p. 46, 81 N. E. 549.

"Whether a given use is reasonable or not is a question of fact depending on many and varied facts."[15]

But, conceding the impossibility of framing a definite and universally applicable rule, still there are some propositions as to specific points which are generally recognized as correct, whether you call them propositions of law, or of fact, or of "curial fact." Mr. Rankine says that "certain rules have been gathered by experience to aid in attaining a consistent and equitable reconciliation between the seemingly conflicting and really identical interests of neighboring landholders."[16] Mr. Wiel, speaking of interference with a stream, says: "What is such unreasonable interference has become defined by repeated decisions of particular cases, crystallizing into some rules."[17] Moreover, "the questions of fact which arise in determining whether a use is reasonable are limited by certain rules of law." Thus, as to the use of a stream by an upper riparian proprietor, "a permanent diversion of a substantial portion of the water, to the detriment of an owner below, cannot be found to be reasonable, although it may be convenient and profitable for the diverter. It is an invasion of a legal right."[18]

The scope of this paper is comparatively limited, and fragmentary.

The present purpose is not to discuss all the rules of law or of "curial fact" that may be applicable to the infinite variety of situations liable to occur under this general topic.

It is rather: (1) to point out and attempt to remove some special sources of confusion in dealing with the general subject: (2) To consider a few out of the large number of specific questions that may arise in connection with the general topic.

One source of confusion consists in the use of the words "damage" and "injury" as equivalent terms. In common speech these words are "practically synonymous."[19] But in law they frequently are used in senses widely different from each other, as appears from contrasting the two expressions: *damnum sine*

[15]Scott, *J.*, Newgold *v.* Childs Co. (1911) 148 App. Div. 153, 154, 132 N. Y. Supp. 366.

[16]Rankine, Law of Land-ownership in Scotland (3rd ed.) 351.

[17]1 Wiel, Water Rights in the Western States (3rd ed.) § 739, p. 795.

[18]Knowlton, *C. J.*, McNamara *v.* Taft (1907) 196 Mass. 597, at p. 600, 83 N. E. 310.

[19]See definitions in Webster's Dictionary.

injuriâ and *injuria sine damno*. *Damnum* means actual harm, appreciable loss. *Injuria* here is used in its literal signification, as a compound of the two Latin words *in* and *jus*. Here it means wrongful in law—an act which is against law—in violation of law—unlawful—an infringement, or violation, of a legal right of the plaintiff. *Damnum sine injuriâ* means harm or loss without any violation of legal right.[20] In decisions relative to reasonable user, judges, who fully understand the above distinctions, often use damage and injury as interchangeable terms, thereby causing much confusion.

Language is sometimes used which might be understood as asserting that, whenever damage, in the above sense of actual harm, has been suffered by plaintiff, defendant cannot set up the defense that the damage was occasioned by defendant's reasonable use of his own property. But this view is erroneous. Nor is it necessarily a ground of recovery that the damage was foreseeable by defendant,—"there are many uses of land that are reasonable, although the landowner knows they will cause a damage to his neighbor."[21] "The respective rights and liabilities of adjoining land owners cannot be determined in advance * * * by the simple test of whether the obvious and necessary consequences of a given act by one is to damage the other. The fact that the damage is foreseen, or even intended, is not decisive apart from statute. Some damage a man must put up with, however plainly his neighbor foresees it before bringing it to pass."[22] "Every person has the reasonable enjoyment of his own property, and so long as the use to which he devotes it violates no rights of another, however much damage others may sustain therefrom, his use is lawful."[23]

That damage resulted is a circumstance to be weighed in determining whether defendant's user was reasonable in view of the interests of both parties; but it does not conclusively establish the unreasonableness of the user.

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[20]See 1 Sedgwick, Damages (9th ed.) § 32, §§ 96-99; Salmond, Jurisprudence (Ed. of 1902) 406, 407; 3 Parsons, Contracts (5th ed.) § 14, p. 217; Engerud, *J.*, Carroll *v.* Township of Rye (1904) 13 N. D. 458, at p. 466, 101 N. W. 894; 1 Lewis, Eminent Domain (3rd ed.) § 347.

[21]Doe, *J.*, in Thompson *v.* Androscoggin R. I. Co., 54 N. H. at p. 551.

[22]Holmes, *J.*, Middlesex Company *v.* McCue, 149 Mass. at p. 104.

[23]Massey, *J.*, in Bliss *v.* Grayson (1899) 24 Nev. 422, at p. 455, 56 Pac. 231.

See also dissenting opinion of Lord Young, in Inglis *v.* Shotts Iron Co. (1881) 8 Scotch Sess. Cas., 4th Series, 1006, at p. 1025.

It may sometimes be contended that there can be no recovery if the damage is "consequential." The term "consequential damage" is an equivocal one. On the one hand, it is used to denote a damage which is so remote a consequence of an act that the law affords no recovery for it. On the other hand, it is used to denote damage which, though distinctly traceable to the defendant's tort as the effective cause, did not follow immediately upon the commission of the tort. In such a case, there is no good reason why the defendant should escape liability on account of the interval of time elapsing before the happening of the damage. The phrase "consequential damage" has never served any useful purpose except in marking a distinction between damage which was formerly recoverable in an action of case and that which was formerly recoverable in an action of trespass. Mr. Salmond[24] says that the term is now "merely an inheritance from an obsolete system of procedure."[25]

Another, and a prolific, source of confusion consists in assuming that the maxim *sic utere tuo ut alienum non lædas* furnishes, *per se,* a solution to all legal problems respecting reasonable user.[26] It is not uncommon for judges to decide important cases without practically giving any reason save the quotation of this maxim, which is evidently regarded by the court as affording, by its very terms, a satisfactory *ratio decidendi.*[27] Yet in the vast majority of cases this use of the phrase is utterly fallacious. And its

[24]Torts (4th ed.) 184, n. 7.

[25]See discussion by present writer: 15 Columbia Law Rev. 13-14; 25 Harvard Law Rev. 250-251; Eaton *v.* B. C. & M. R. R. (1872) 51 N. H. 504, at pp. 519-521; Doe, *J.,* Thompson *v.* Androscoggin R. I. Co., 54 N. H. at pp. 550-554.

[26]It "is sometimes thought the 'open sesame' of this and all other branches of the law." See 1 Wiel, Water Rights in the Western States (3rd ed.) § 710, n. 16.

[27]Sometimes this maxim is said to be of divine origin; it being tacitly assumed that most maxims are of mere human origin.

This maxim "is not founded in any human statute, but in that sentiment expressed by Him who taught good will toward men, and said, 'Love thy neighbor as thyself.'" Brown, *J.,* in Barger *v.* Barringer (1909) 151 N. C. 433, at p. 440, 66 S. E. 439. It is "a maxim as old as the common law, and in its principle far older, for it is the moral law of God, and is binding everywhere and on every man." Ellsworth, *J.,* in Brown *v.* Illius (1858) 27 Conn. 84, at pp. 97-98. The maxim "is the legal application of the gospel rule of doing unto others as we would that they should do unto us," Kent, *J.,* in Barnes *v.* Hathorn (1866) 54 Me. 124, at p. 125. "That rule is almost equal to the Golden Rule in importance," Brannon, *J.,* in Day *v.* Louisville etc. Co. (1906) 60 W. Va. 27, at p. 29, 53 S. E. 776.

use, being mistaken for a solution, has the effect of preventing a thorough investigation.[28]

Obviously, the maxim cannot be applied without first ascertaining the meaning of *tuo, alienum,* and *lædas.*[29]

If by *lædas* be meant damage, the maximum is untrue as a legal proposition; since the legal exercise of a right is often accompanied with the infliction of positive harm upon another. If by *lædas* be meant injury in the literal sense of an unlawful act (*in* and *jus*), an act in violation of another's legal right,[30] then the maxim is a mere truism or identical proposition. It does not tell us what is a legal right or what constitutes a violation of a legal right.[31] "This maxim * * * paraphrased means no more than: 'Thou shalt not interfere with the legal rights of another by the commission of an unlawful act;' or 'Injury from an unlawful act is actionable.' This affords no aid in this case in determining whether the act complained of is actionable, that is, unlawful. It amounts to no more than the truism: An unlawful act is unlawful. This is a mere begging of the question; it assumes the very point in controversy, and cannot be taken as a *ratio decidendi.*"[32]

"The maxim, *Sic utere tuo ut alienum non lædas,* is mere verbiage. A party may damage the property of another where the law permits; and he may not where the law prohibits; so that the maxim can never be applied till the law is ascertained; and, when it is, the maxim is superfluous."[33] "The maxim, * * * is no help to decision, as it cannot be applied till the decision is made."[34]

"While, therefore, *sic utere túo etc.,* may be a very good moral precept, it is utterly useless as a legal maxim. It determines no right; it defines no obligation."[35] "Such a maxim can be of no

[28]The following criticisms and the leading authorities cited, are mainly reproduced from an article by the present writer, on the Use of Maxims in Jurisprudence, in 9 Harvard Law Rev. 14-17.

[29]See 2 Austin, Jurisprudence (3rd Eng. ed.) 795.

[30]See Andrews, *C. J.,* in Booth *v.* Rome etc. R. R., 140 N. Y. at p. 275.

[31]These are, in substance, the views expressed in 2 Austin, Jurisprudence (3rd Eng. ed.) 829.

[32]Ingersoll, *Sp. J.,* in Payne v. W. & A. R. R. (Tenn., 1884) 13 Lea 507, at pp. 527-8.

[33]Erle, *J.,* in Bonomi *v.* Backhouse (1858) Ell. Bl. & Ell. 622, at p. 643.

[34]Sir Wm. Erle in Brand *v.* Hammersmith etc. Ry., L. R. 2 Q. B. at p. *247.

[35]Selden, *J.,* in Auburn, etc. Co. *v.* Douglass (1854) 9 N. Y. 444, at pp. 445-6.

assistance in determining the primary question of liability."[36] "Inasmuch as the exercise of any right of property by the owner may injure another, the Latin maxim does not help to a solution; the real question is what injury to another is, and what is not permissible."[37]

Judge Holmes[38] says: "decisions * * * often are presented as hollow deductions from empty general propositions like *sic utere tuo ut alienum non lædas,* which teaches nothing but a benevolent yearning." In 1879, a correspondent of the Solicitor's Journal[39] went so far as to call this maxim "an ancient and solemn impostor."[40]

Attempts have been made to answer the above quoted criticisms of Sir William Erle, and to justify (partially, at least) the use of the maxim as a working rule of law. These attempts are commented on, by the present writer, in 9 Harvard Law Rev. 16, 17.

A third source of confusion consists in the employment of the word "reasonable" in two different meanings.

Reasonable user may mean (1) reasonable from the defendant's point of view; *i. e.,* reasonable if the interest of the defendant alone is to be regarded, without reference to the damage thereby caused to adjacent owners. Or, it may mean (2) reasonable, not solely in view of defendant's interest and convenience, but if considered also in view of the interest of surrounding landowners.

The second meaning is the correct one when applied to a case where a defendant attempts to justify a *primâ facie* tort on the ground that he was making a reasonable use of his own property; *i. e.,* where defendant alleges that, in doing the act which resulted in damage to plaintiff, he was not acting in excess of his right to make a reasonable use of his own property.

"For the purpose of ascertaining what is reasonable, both sides of the question must be looked at." It is not enough to ask: Is the defendant using his property in what would be a reasonable manner if he had no neighbor, *i. e.,* if he were the only person

[36] 1 Street, Foundations of Legal Liability 193, n. 4.

[37] Judge Swayze, 25 Yale Law Journal 9.

[38] 8 Harvard Law Rev. 3.

[39] Vol. 23, at p. 599.

[40] See further Engerud, *J.,* in Carroll *v.* Rye Township, 13 N. D. at p. 466; Digby, Real Property (5th ed.) 188, n. 1; 1 Wiel, Water Rights in the Western States (3rd ed.) § 710, n. 16; 2 Wiel, *op. cit.,* § 1136, n. 12; Carpenter, *J.,* in Ladd *v.* Granite State Brick Co. (1894) 68 N. H. 185, at p. 186, 37 Atl. 1041.

whose interest could be affected? "The question is, is he using it reasonably, having regard to the fact that he has a neighbor?"[41] A use is not reasonable, if it unreasonably prejudices the rights of others. "In determining the question of reasonableness, the effect of the use upon the interests of both parties, the benefits derived from it by one, the injury caused by it to the other, and all the circumstances affecting either of them, are to be considered."[42] "We concede", said Loomis, *J.*, "that the law will not interfere with a use that is reasonable. But the question of reasonable use is to be determined in view of the rights of others."[43]

Some confusion has been occasioned by the failure to state which of the above two meanings was in the mind of a speaker or writer. Thus, in *Reinhardt* v. *Mentasti,*[44] Kekewich, *J.*, was understood to assert, in substance, that the only question for consideration in that case was, whether in fact the injury has been inflicted on the plaintiff by the defendant's user of his property, and that the consideration whether the defendant's user was reasonable has no bearing on the question. His language was criticized by Mr. Garrett, in his work on Nuisances;[45] and by Buckley, *J.*, in *Sanders-Clark* v. *Grosvenor Mansions Co.*[46] Thereupon Kekewich, *J.*, in the subsequent case of *Attorney-General* v. *Cole & Son,*[47] explained that in the *Reinhardt* case, the defendant, while doing what was reasonable from his own point of view, had actually created a nuisance, and that the *Reinhardt* decision was, in effect, "that when once you established that he was creating a nuisance, the fact that he was doing what was reasonable from his point of view was no defence." In *Attorney General* v. *Cole & Son,* the defendant had acted reasonably from his point of view, but unreasonably if the interests and rights of other parties were also to be considered as well as the interest of Cole himself. By his conduct, viewed from the latter standpoint, he had committed an actionable tort, which would usually be termed a nuisance. Kekewich, *J.*, said that the question here in substance

[41]Theobald, Law of Land, 62.

[42]See the short and very clear opinion of Carpenter, *J.*, in Rindge *v.* Sargent, 64 N. H. at pp. 294, 295. In some other states, the test of reasonable user would not be applied (as it was there in New Hampshire) to determine liability for obstructing the flow of surface water.

[43]Hurlbut *v.* McKone (1887) 55 Conn. 31, at p. 42, 10 Atl. 164.

[44](1889) 42 Ch. D. 685, at p. 689.

[45](3rd ed.) 171-2.

[46][1900] 2 Ch. 373 at p. 375.

[47][1901] 1 Ch. 205.

is, "Can a man reasonably create a nuisance?" The learned judge answered in the negative:[48] "If he commits a nuisance, then he cannot say that he is acting reasonably. The two things are self-contradictory."[49] On the other hand, if a defendant has not exceeded his right of user when considered in reference to the interests and rights of both parties, he has not committed a nuisance.[50] As was said by Romer, *L. J.*, "reasonable user is not a nuisance."[51]

A fourth source of confusion consists in the use of the ambiguous expression "in a convenient place".

An attempt is sometimes made to justify what is *primâ facie* an actionable tort ("a nuisance" so called), on the ground that the defendant is carrying on his business, which causes damaging results, "in a convenient place". "Convenient" to whom? Is the question of convenience to be determined by considering solely the interest of the defendant? Undoubtedly the convenience to the defendant is one of the elements to be weighed in deciding the reasonableness of the user; but it is not the only element of the user. He is not justified merely "because it is a matter of convenience or economy" for him to carry on the business in that particular locality.[52] The question here is one phase or branch of

[48]At p. 207.

[49]See Broun, Law of Nuisance in Scotland, Chapter XI on Invalid Defences, p. 111. "(3) That the defender is making a legal use of his property. If a nuisance is proved, such a plea as this is ridiculous on the face of it, yet it has often been brought forward and repelled."

[50]See Scott, *J.*, in Newgold *v.* Childs Co., 148 App. Div. at p. 154.

[51]Attorney-General *v.* Brighton etc. Association (1900) 81 L. T. R. [N. S.] 762 at p. 767.

"If an act or omission is *primâ facie* a nuisance, it is no defence for the defendant to prove:—

(a) that the act or omission complained of was, *per se*, a reasonable use of the defendant's property." Jenk's Digest of English Civil Law, Book 2, Part 3, § 836.

The above expression—*"per se*, a reasonable use"—is open to misapprehension. It may mean that the act in question, if viewed as "a single isolated fact" (presented as it were, *in vacuo*), would not be deemed an unreasonable use. But the question whether an act or user is reasonable is to be determined not merely by an abstract consideration of the act itself, but in reference to its circumstances. There is no absolute standard; but the surrounding circumstances, the considerations of time and place, are all important in arriving at a decision in each case. (See Thesiger, *L. J.*, in Sturges *v.* Bridgman (1879) 11 Ch. D. 852, at p. 865, and Garrett, Nuisances (3rd ed.) 6, as to tests of nuisance.) The expression—*"per se*, a reasonable use"—does not mean that a certain act is reasonable everywhere and under all circumstances. It can mean nothing more than this—that the act is not always and everywhere unreasonable.

Compare a previous section (831) in Jenk's Digest.

[52]See Canfield *v.* Andrew (1882) 54 Vt. 1, at p. 16.

the general question of reasonable user discussed *ante*. To determine the reasonableness, the interests of both parties are to be considered. It is true "that what may be a nuisance in one locality may not be so in another"; but it is not true that there can be no nuisance if the locality is "convenient" for the defendant. "A convenient place" means "not a place which may be convenient to the party himself, looking at his interest merely, but a place suitable and convenient when the interests of others are considered" as well as the interest of the defendant;[53] "so convenient in the use that it should not be a nuisance to anybody".[54]

We have said that, in determining the reasonableness of a particular use, the tribunal must consider, not only the damage inflicted by it upon one party, but also the benefit derived from it by the other party. By this is meant, the benefit derived by such party in his capacity of an individual landowner. Can he go beyond this, and ask the tribunal to consider in his favor (as a justification for the damage inflicted) the benefits derived by the public at large?

In a controversy between two neighboring landowners, the duties of each owner to the other, and their correlative rights, are private duties and rights rather than public. The interests in conflict are "not those of the public and of an individual, but those of two private owners who stand on equal ground as engaged in their own private business."[55]

Besides the obligation "which every property owner is under to the owners of neighboring property" (a violation of which may be made the ground of a private action for damages), he is, of course, under certain obligations to the public at large (to the state).

If his unrestrained use of certain land "is positively inimical to the public interests", the state by the exercise of the police power, may regulate and restrict the use and enjoyment of the land by the owner, and may even carry the restriction to the extent of practically prohibiting the only beneficial method of user; thus in

[53]See Williams, *J.*, in Bamford *v.* Turnley, 3 Best & Sm. at p. *75.

[54]Lord Halsbury, in Fleming *v.* Hislop (1886) 11 App. Cas. 686, at p. 697.

In support of the above views, see Bamford *v.* Turnley, 3 Best & Sm. *62, overruling Hole *v.* Barlow (1858) 4 C. B. [N. S.] *334. See also Glegg, Reparation (1st ed.) 287; Terry, Leading Principles of Anglo-American Law, 455.

[55]Williams, *J.*, Robb *v.* Carnegie Bros. & Co. (1891) 145 Pa. 324, at p. 341, 22 Atl. 649.

effect destroying the value of the property. But the owner has no right to compensation.

If the property of a private owner is required for a public use, the state, by the exercise of the power of eminent domain, can take the property from him, "because of its utility to the State." In effect, he must submit to compulsory purchase by the state. But this power of the state can be exercised only upon condition of compensating the private owner.[56]

In litigation between two private landowners, the defendant, in order to justify his infliction of great damage upon the plaintiff may sometimes urge the consideration that a great benefit to the public at large has resulted from his conduct. He may virtually say: "I admit that my acts have deprived you of all beneficial use of your property rights; but I ought to go scot free because my conduct was necessary in order to secure a great benefit to the entire community." In effect, he claims that he, as a self-appointed representative of the state, is entitled to do with absolute impunity what the state (or its duly constituted representative) could do only upon the condition of making compensation.

This claim is effectually answered by Professor Bohlen, who has clearly shown the injustice of compelling the plaintiff to endure, without any compensation, the entire damage done to his estate, simply for the reason that the general public receives an incidental benefit which he shares merely as one member of the public. If it be assumed that the public ought to make compensation for the damage inflicted in prosecuting the undertaking, yet why should the plaintiff be compelled to contribute a greater part of the damage "than any other member of the public, who, as such, share equally the benefits derived from permitting it"?[57]

"To throw the whole of the loss upon one member of the public, simply because it is his misfortune that his property should be situated near to the place which the defendant selects to carry on the business, tending to increase the general prosperity, is, it seems to the writer, to throw upon him a loss altogether out of proportion

[56]As to the contrast between the Police Power and Eminent Domain; see Randolph, Eminent Domain, § 23, and Freund, Police Power, § 511.

[57]See Prof. Bohlen, 59 Univ. of Pennsylvania Law Rev. 444. If any particular class is to be peculiarly benefited by the undertaking, the whole, or the greater part, of the expense may be laid upon that class, so long as the burden is borne equally by all the members of that class. See 59 Univ. of Pennsylvania Law Rev. 444, note at pp. 445-6. But that is not the case we are now dealing with.

to his share in the benefit derived from the encouragement of the industry."

"If the public be interested, let the public as such bear the loss."[58]

Payment of the entire damages out of public funds raised by taxation is a very different thing from laying the whole burden "upon some individual, having no peculiar interest in the object secured by its expenditure, simply because of some accidental circumstance, such as the location of his property."[59]

It has been said, "that where the alleged rights of adjoining landowners conflict, it is better that one of them should yield to the other and forego a particular use of his land, rather than, by insisting upon that use, deprive the other altogether of the use of his property; which might often be the consequence of carrying on the operation."[60] And it is said that "it is better that one man should surrender a particular use of his land than that another should be deprived of the beneficial use of his property altogether."[61] But the expressions—"forego a particular use of his land", and "surrender a particular use of his land," are evidently employed on the supposition that the party foregoing or surrendering "a particular use" will still be able to make some other beneficial use of his land.[62]

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[58]Prof. Bohlen, 59 Univ. of Pennsylvania Law Rev. 444. *Cf.* Eaton *v.* B. C. & M. R. R., 51 N. H. at pp. 518-519.

[59]59 Univ. of Pennsylvania Law Rev. 445, n. 136.

Assuming that the damaged landowner may maintain a suit at law to recover actual damages, should a court of equity refuse to give him an additional remedy by the grant of an injunction? Should the landowner be refused equitable, as distinguished from legal, relief? Upon this point there is a conflict of authority. But the ground upon which some courts might refuse an injunction "can apply only in equity and has no application to an action at law for damages." See 1 Wiel, Water Rights in the Western States (3rd ed.) 715.

For conflicting authorities as to equitable relief, see cases collected and views expressed in 1 J. N. Pomeroy, Jr., Equitable Remedies, §§ 529-532, published as Vol. 5, Pomeroy's Equity Jurisprudence (Ed. of 1905); 3 Lindley, Mines (3rd ed.) § 842, pp. 2075-2082, 2087; 1 Wiel, Water Rights in the Western States (3rd ed.) §§ 648-653.

[60]Bigelow, Torts (8th ed.) 466.

[61]See Nortoni, *J.*, Blackford *v.* Heman Construction Co. (1908) 132 Mo. App. 157, at p. 162, 112 S. W. 287.

[62]Thus, Williams, *J.*, in Gulf etc. R. R. *v.* Oakes, 94 Tex. at p. 160, says that the owner "may be required to forego a particular use when it is not essential to the substantial enjoyment of his property."

It is also said that, while the courts require each of the holders of conflicting rights "to lay aside something of what pertains to mere convenience and comfort, yet they permit each to stand so far on its own rights as not to be destroyed."[63] And it is frequently assumed that a mode of user by *A* cannot be deemed reasonable if it prevents any beneficial user whatever by *B*.

But the latter statements are correct only when the conflicting rights are regarded by the law as equal in grade or importance. Not *all* rights, or modes of user, are equal to each other. One may be superior and the other inferior; one may be paramount and the other subordinate. "Sometimes, * * * the law subordinates the one right to the other." "* * * the latter" being "the better right of the two."[64] If one right is thus regarded as superior or paramount to the other, the law may, in some cases, permit it to be exercised or enforced to such an extent as to practically destroy the inferior or subordinate right.[65]

It will be asked, what are the tests or modes of distinguishing superior rights. As in regard to some other topics, specific instances can be given,[66] but it is not easy to generalize. It is, however, possible to assert (negatively) that certain circumstances do *not* furnish a legal test of superiority or inferiority. Thus, the fact that *A's* tract of land is of larger size, or of greater absolute value, or produces a larger rental, than *B's* adjoining tract, does not *per se* confer upon *A* a right of user superior to *B's* right.[67] Still less does it confer on *A* a right to make such use of his land as will practically prevent any beneficial user whatever on the part of *B*.

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[63]Bishop, Non-Contract Law, § 418.

[64]Clerk & Lindsell, Torts (6th ed.) 7-8; *cf.* Bishop, Non-Contract Law, §§ 105-107.

[65]The subordinate right of *B* may be rendered worthless; either (1) by prohibiting its exercise lest it should interfere with the paramount right of *A;* or (2) by allowing the superior right of *A* to be exercised in a manner which, by affirmative aggression, destroys the land of *B,* so far as its capacity for beneficial use is concerned.

[66]"Thus, a landowner has a right to dig and carry away his own soil, but if in so doing he lets down the soil of his neighbor he is answerable; for the right of the latter to have his soil supported is the better right of the two." Clerk & Lindsell, Torts (6th ed.) 7-8.

[67]In Weaver *v.* Eureka Lake Co. (1860) 15 Cal. 271 at p. 275, Cope, *J.*, said: "a comparison of the value of conflicting rights would be a novel mode of determining their legal superiority."

The above question as to the test of a superior right is, in reality, a part or branch of the larger question as to the general tests of reasonable or unreasonable user. And, as has been said on an earlier page, it does not seem possible to formulate a definite rule or test of universal application, a rule that will automatically solve all cases. Moreover the answer to the larger question is complicated (made specially difficult) by the fact that the same special considerations do not carry the same weight in all states alike. In some states, a particular mode of user will be preferred to other modes; while, in some other states, the latter modes would be deemed paramount to the former.[68] Some tests have been suggested which are claimed to be applicable in all states alike. Other tests or preferences are suggested, which it is admitted prevail in only a part of the states.

Two tests have been prominently suggested, as applicable in all states alike, *viz.*: ordinary or common user; natural user.

As to the test of "natural" user. The prominence of this term in the present connection is largely due to its use by Lord Cairns, in *Rylands* v. *Fletcher*.[69] The precise question decided in that case was whether the defendant, in building a reservoir and allowing water to accumulate therein, was acting at his own peril and hence was absolutely liable, irrespective of negligence, for damage caused by the escape of the water. In the first paragraph where Lord Cairns employs the term "natural user", it might be possible to argue that it should be interpreted as synonymous with ordinary user. But in a later paragraph the term is obviously employed in a sense different from "ordinary". Lord Cairns there says: "On the other hand if the Defendants, not stopping at the natural use of their close, had desired to use it for any purpose which I may term a non-natural use, for the purpose of introducing into the close that which in its natural condition was not in or upon it, for the purpose of introducing water either above or below ground in quantities and in a manner not the result of any work or operation on or under the land,—" then the defendants were acting at their own peril and would be liable for damaging results.

The employment of the term "natural" in this connection, with

[68] See *post*, as to conflicting claims of mining and agriculture.

[69] (1868) L. R. 3 H. L. 330, at pp. 338, 339.

the interpretation thus given it by Lord Cairns, has not met with universal approval.[70]

In *Brown* v. *Collins*,[71] Doe, *J.*, states specific objections to it (as well as to the so-called Blackburn rule, which is endorsed by Lord Cairns).[72]

Under the "natural" test, as interpreted by Lord Cairns, the erection of a wooden building on land where there were no trees, would be a non-natural use, undertaken at the peril of the owner.

We think that the term "natural" as defined by Lord Cairns is not a satisfactory test of the reasonableness of the use of land. And, if the term "natural" is not employed in Lord Cairns' meaning, it would often, if not generally, be regarded as synonymous with "ordinary".[73]

As to the suggested test of "ordinary" user. This is better than "natural"; but it is not infallible. A mode of user which, if viewed as a single isolated fact, might generally be spoken of as "ordinary", would frequently be deemed "reasonable". But a particular mode of user (*e. g.* a man digging in his own land) is not to be looked at as a single isolated fact. No fact is ever "presented *in vacuo*."[74] The environment is to be regarded.[75]

"Ordinarily, * * * the owner of land has a perfect right to use and remove the earth, gravel and clay of which the soil is composed, as his own interest or convenience may require. But can he do this when the same materials form the natural embankment of a watercourse? He may say, perhaps, that he merely in-

[70]It is said to have been "unfortunately" used. See Pitney, *V. C.*, in Beach *v.* Sterling etc. Co. (1895) 54 N. J. Eq. 65, at p. 75, 33 Atl. 286. And it has been called "an attractive but ambiguous form of words". Mr. Gest, 33 Am. Law Reg. [N. s.] 103.

[71](1873) 53 N. H. 442, at p. 448.

[72]Two points made by Judge Doe are: (1) If the Cairns principle is correct, its application cannot be limited to things which a man "brings on his land"; "it must be applied to all his acts that disturb the original order of creation." (2) "Even if the arbitrary test were applied only to things which a man brings on his land; * * * * it would impose a penalty upon efforts, made in a reasonable, skilful, and careful manner, to rise above a condition of barbarism."

It is impossible, however, for any abbreviation to do justice to Judge Doe's criticisms, which have never been satisfactorily answered.

[73]If it be conceded that a use cannot be deemed reasonable unless it be natural in the Cairns sense, yet, even if it is natural in that sense, it does not necessarily follow that it must be always deemed reasonable.

See an able note by Prof. Pepper, 31 Am. Law Reg. [N. s.] 38-44.

[74]Prof. E. R. Thayer, 29 Harvard Law Rev. 807.

[75]For good illustrations, see Folger, *C. J.*, Webb *v.* Rome etc. R. R. (1872) 49 N. Y. 420, at p. 429; Salmond, Jurisprudence (Ed. of 1902) 402.

tends to make use of materials which are his own, and to which he has a right, and for which he has other uses. But we think the law will admit of no such excuse; he knows that, when these materials are removed, the water, by the law of gravitation, will rush out, and all the mischievous consequences of diverting the watercourse will follow."[76]

"A person who excavates on his land in such a manner as to let in the sea, which undermines and injures adjoining land of another, is liable to an action by the latter for the injuries so caused, including injury done to a well by the percolation of salt water."[77]

In *Eaton* v. *B. C. & M. R. R.*,[78] Eaton owned a meadow in the neighborhood of an inland stream called Baker's river. A ridge of land, on the intervening premises of a riparian proprietor whom we will call *R*, completely protected the meadow from the effects of floods and freshets in the river. Through this ridge the defendant railroad company, in constructing their road, made a deep cut, through which the waters of the river in floods and freshets sometimes flowed. Suit was brought for damages done to Eaton's meadow by water flowing through the cut and carrying sand and gravel upon the meadow, during a freshet such as might reasonably be expected occasionally to occur. The railroad company "virtually conceded that, if the cut through the ridge had been made by a private land-owner, who had acquired no rights from the plaintiff or from the legislature, he would be liable for the damages."[79] They attempted to justify under the authority of their charter granted by the legislature. The court held this justification insufficient, and did not go into the reasons why a private owner, without legislative authority, would have been liable, such liability on his part having been "virtually conceded". But in the subsequent case of *Thompson* v. *Androscoggin R. I. Co.*,[80] Doe, *J.*,

[76]Shaw, *C. J.*, Com. *v.* Alger (1851) 61 Mass. 53, at p. 87. The learned Judge had previously said, at p. 87, "that when land is so situated, or such is its conformation that it forms a natural barrier to rivers or tidal watercourses, the owner cannot justifiably remove it, to such an extent as to permit the waters to desert their natural channels, and overflow, and perhaps inundate fields and villages."

[77]Headnote to Mears *v.* Dole (1883) 135 Mass. 508. Defendant excavated and carried away for sale the soil and gravel from his land on the seashore. He contended that to deprive him of this use of his land would render his land comparatively worthless. Mears *v.* Dole is sustained by Murray *v.* Pannaci (1902) 64 N. J. Eq. 147, 53 Atl. 595.

[78]*Supra*, note 25.

[79]See at pp. 506, 520.

[80]54 N. H. at 545 *et seq.*

discussed elaborately the reasons why *R*, the owner of the intervening ridge, would have been liable if he had himself made the cut. The opinion shows very clearly that *R*, in removing the natural barrier, would have been making an unreasonable use of his own land.[81]

In effect, the right of the owner of the meadow to have his land protected (from the overflow of the river) by means of the natural barrier on his neighbor's land was deemed paramount to the subordinate right of the neighbor to dig in his own soil.[82]

How reconcile the imposition of liability in *Hendershott* v. *City of Ottumwa*,[83] with the denial of liability in *Middlesex Company* v. *McCue*?[84]

In the Iowa case, the city raised to the height of about twelve feet, the natural grade of the street in front of plaintiff's lots. The top or crown of the embankment was made the full width of the street. "This could not be done without so depositing the earth that it rolled over upon plaintiff's lots, while the work of filling up the street was in progress. The effect of thus filling the street was, that a large quantity of earth was deposited upon the front of plaintiff's lots, and part of his hedge was destroyed." *Held;* that defendant was liable.[85]

In the Massachusetts case, the defendant owned a side hill, sloping down to plaintiff's mill pond. Defendant, for the purpose of raising garden vegetables, annually cultivated his land in the ordinary way, and brought thereon manure and ashes, which he

[81]See pp. 549-558. Mr. Lewis, in his very able work on Eminent Domain (3rd ed.) vol. 1, § 68, says that "the true principles" of the decision in Eaton *v.* B. C. & M. R. R., *supra*, note 25, are "set forth with great clearness and ability" in Judge Doe's opinion in Thompson *v.* Androscoggin R. I. Co., and he quotes from the latter opinion at great length.

[82]In support of Judge Doe's opinion in the Thompson case see: Brown *v.* Cayuga etc. R. R. (1855) 12 N. Y. 486, at pp. 490-491; Graham *v.* Keene (1892) 143 Ill. 425, at pp. 431-2, 32 N. E. 180; Craft *v.* R. R. (1904) 136 N. C. 49, 48 S. E. 519; Wendel *v.* Spokane County (1902) 27 Wash. 121, 67 Pac. 576; Robinson *v.* N. Y. & Erie R. R. (N. Y., 1858) 27 Barb. 512, E. Darwin Smith, *J.*, at pp. 522-523.

[83](1877) 46 Iowa 658.

[84]*Supra*, note 8.

[85]For cases where defendants, who were private landowners, were held liable for substantially the same acts as those of the city in the Iowa case: see Barnes *v.* Masterson (1899) 38 App. Div. 612, 56 N. Y. Supp. 939; Berry *v.* Fleming (1903) 87 App. Div. 53, 83 N. Y. Supp. 1066, where the court said that there was an "attempted perpetual occupation" of a portion of plaintiff's property "to subserve the interests of the defendant."

dug and spaded into the soil. The result was that particles of solid matter rolled down the hill or were washed down by surface drainage, and were ultimately deposited in the mill pond with the effect of gradually filling up the part of the pond next the hill. The court *held,* that defendant was not liable; and dismissed plaintiff's bill brought to restrain defendant from filling the mill pond.

In each of the above cases, the plaintiff's land or pond was invaded by solid matter brought there by defendant's operations. In the Massachusetts case, the invasion was held within the defendant's right; in the Iowa case, not so. Why this difference? Mainly, as we think, because of the purpose of defendant's operations. In one case, he was attempting to permanently improve his land. In the other case, he was attempting to raise an annual crop by ordinary methods of husbandry.[86]

The law regards the defendant's right permanently to improve his land as subordinate to plaintiff's right to have his land free from invasion by particles of solid matter. On the other hand, the law regards the defendant's right to raise an annual crop on his side hill by ordinary methods of husbandry as paramount to plaintiff's right to have his land free from invasion which is an incidental result of the exercise of defendant's right. (Of course, an "invasion" may be so extensive and so damaging that it cannot be justified as a reasonable exercise of defendant's right.)[87]

As to some modes of user, the question of their reasonableness, when exercised under ordinary circumstances, would probably be

[86]Spading the land cannot be less justifiable than ploughing; and ploughing is generally assumed to be a reasonable use. See Brett, *M. R.,* in Whalley *v.* Lancashire etc. Ry. (1884) 13 Q. B. D. 131, at p. 141.

Cf. Livingston *v.* McDonald (1866) 21 Iowa 160, at p. 171; Knoll *v.* Mayer (Ill. App., 1883) 13 Brad. 203; editorial note in 32 Am. Dec. at pp. 124, 125.

[87]In Livingston *v.* McDonald, 21 Iowa at p. 171, Dillon, *J.,* refers to the laws of Justinian as to "the distinction * * * between injuries occasioned by strictly agricultural operations, and those occasioned by work designed to reclaim or improve the land." See also note to Martin *v.* Jett, 32 Am. Dec. pp. 124, 125.

As to cases where the annoyance or inconvenience occasioned by defendant's conduct is merely temporary: *e. g.,* discomfort occasioned by the demolition of an old building or by the erection of a new one: see Williams, *J.,* in Harrison *v.* Southwark etc. Co. (1891) 64 L. T. R. [N. S.] 864 at pp. 865-6, [1891] 2 Ch. 409; Swisher *v.* Sipps (1902) 19 Pa. Super. Ct. 43, at pp. 47-48; Herrlich *v.* N. Y. Central etc. R. R. (1910) 70 Misc. 115, 126 N. Y. Supp. 311; Salmond, Torts (4th ed.) 216; Pollock, Torts (10th ed.) 426-7; Burdick, Torts (2nd ed.) 404; Bramwell, *B.,* Bamford *v.* Turnley, 3 Best & Sm. at p. *84; Glegg, Reparation (2nd ed.) 365, 366.

decided the same way in all states alike. But as to other modes of user, there might sometimes be a tendency to hold them reasonable in some states but not in others. Differences in local surroundings might influence the decision. In some states, a particular mode of user would be regarded as paramount to other modes, while in other states the latter modes would be deemed at least equal, if not superior, to the former.[88]

Two points should be especially noted.

First: The question of superiority between two modes of user may be, and has been, decided differently in the same state at different dates.[89]

Second: A mode of user may be paramount for some purposes and in regard to some situations, but not for other purposes or in all situations.[90]

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[88]In Clark *v.* Nash (1905) 198 U. S. 361, 25 Sup. Ct. 676, the United States Supreme Court held, that where a statute of Utah permitted condemnation of land by an individual to obtain water for irrigation of his own land, this was condemnation "for a public use," and hence a valid exercise of the state's power of eminent domain. But the court, while thus deciding, admitted that, "in some States, probably in most of them," a contrary result would be reached. They did not regard the inquiry—what is a public use—as an abstract question to be decided alike in all states. They said: that the court should recognize differences in the situation, soil, climate, etc., between states; that the question what is a public use must depend on the surrounding facts; and that weight should be attached to the views of the state legislature and the state court, the members of these bodies being more familiar with the surrounding than a stranger.

We think that similar views must apply upon the question whether a certain mode of user is to be deemed reasonable in a particular locality.

[89]"In the early days of placer mining in California, that industry was the paramount one." 3 Lindley, Mines (3rd ed.) § 848, p. 2094. At the present time, "mining is no longer the paramount industry in California." 1 Wiel, Water Rights in the Western States (3rd ed.) 651.

[90]Compare the Pennsylvania decisions: (1) as to the immunity of miners in regard to the pollution of streams; and (2) as to the liability of miners for, directly or indirectly, dumping mining debris into a stream so as to cause an overflow and the deposit of the debris upon the land below.

As to (1): In Pennsylvania Coal Co. *v.* Sanderson (1886) 113 Pa. 126, 6 Atl. 453, the miner pumped up water from the mine to the surface, whence it flowed into an adjacent stream, thereby polluting the quality of the stream water so as to impair its use for drinking purposes by the lower proprietor. *Held,* that the miner was not liable. We understand the court to have indorsed the view that mining is "the leading industrial interest of the state, * * * the prosperity of which affects every household in the Commonwealth." See p. 162.

As to (2): The miner was *held* liable for the deposit of the debris in Elder *v.* Lykens Valley Coal Co. (1893) 157 Pa. 490, 27 Atl. 545, and in Hindson *v.* Markle (1895) 171 Pa. 138, 33 Atl. 74.

So in Hill *v.* Standard Mining Co. (1906) 12 Idaho 223, 85 Pac. 907, the court, to use Mr. Wiel's language, distinguished "between the pollution of the quality of the water as a fluid, and filling up the bed of the stream by dumping material in it and making it overflow" (thus depositing debris upon the land of a lower proprietor). See Ailshie, *J.*, at p. 243, and Stockslager, *C. J.*, at pp. 234, 235; 1 Wiel, Water Rights in the Western States (3rd ed.), 564, n. 5. In this case, the court said that the provision in the constitution of Idaho, giving a preferential right to use the water of a stream "for mining purposes," does not give a right to use the stream for dumping purposes.

In some early decisions in California it was held that there was no liability for dumping debris. See citations in 1 Wiel, *op. cit.*, § 527, n. 22. But these early decisions were subsequently reversed by the state court, thereby agreeing with the decision of the federal court in the leading case of Woodruff *v.* North Bloomfield etc. Co. (C. C. 1884) 9 Saw. 441, sometimes called "The Mining Debris Case." See especially at pp. 473-6, 486-7. For California cases, see People *v.* Gold Run etc. Co. (1884) 66 Cal. 138, 4 Pac. 1152, and Hobbs *v.* Amador etc. Co. (1884) 66 Cal. 161, 4 Pac. 1147.

To-day, in jurisdictions where mining is not regarded as a paramount user, the miner would, by the great weight of authority, be held liable in the above case of pollution of water, as well as in the case of depositing debris. See many decisions collected in a series of notes in Lawyers Reports Annotated: 24 L. R. A. 64; 22 L. R. A. [N. S.] 276; 38 L. R. A. [N. S.] 272.